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No. 347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1950.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ELLIS R. LEWIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION OF ELLIS R. LEWIS FOR REHEARING.

SIGMUND W. DAVID,
Attorney for Respondent.

ARTHUR C. CHAPMAN,
Of Counsel.

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PETITION OF ELLIS R. LEWIS FOR REHEARING.

Ellis R. Lewis, respondent in the above entitled cause, presents this petition for a rehearing and in support thereof respectfully shows:

JURISDICTION.

This Court, on March 26, 1951, rendered its decision reversing the judgment of the Court of Claims of the United States. This petition is filed within fifteen days thereafter, under Rule 33 of the rules of this Court.

REASONS FOR GRANTING REHEARING.

I.

The Decision Is Unnecessary To, And In No Way Facilitates, The Proper Administration Of The Income Tax Law.

This petition is not filed under any illusion that because of the brevity of the opinion announced, this Court has not fully and carefully considered the arguments and issues in this case. It is respectfully suggested, however, that, in its desire to render a decision the practical effect of which would facilitate the administration of the income tax law—in its desire to retain as inviolate as possible the principle of annual accounting—this Court has unnecessarily swept aside fundamental legal principles and the logic and equity of the case at bar. There is no need to again argue the law in this case; that has already been done.

It seems inescapable that the core of this Court's decision is found in the last paragraph of Mr. Justice Black's opinion. Finality, it would appear, must be given to the annual accounting period, and that is the reason for the "claim of right" doctrine. This Court has in effect said that this case falls within the reason and rationale of the doctrine. Therein, it is submitted, lies this Court's error. Why does the theory of finality necessitate the "claim of right" doctrine? The Government has stated the reasons in its brief (pp. 11-14, 36, 37). It is said that the Government must not be made a party to private lawsuits; that payment of taxes should not await the outcome of private litigation; and—what ap-

pears to be the fundamental reason—that delay may imperil collection because the taxpayer may not later have the money to pay his taxes. Assuming that these are good and cogent reasons for the "claim of right" doctrine, they have no application in a case such as this.

"Income taxes must be paid on income earned (or accrued) during an annual accounting period" (Opinion, p. 2). But, in reality, the excess salary or bonus paid under and pursuant to a mistake, is not income. That is a simple, undeniable, economic and legal fact, and this Court has not said otherwise. This Court has, in effect, ruled, however, that the "claim of right" doctrine requires such excess salary or bonus to be treated *as though it were income*. According to this Court's decision, to do otherwise would be to depart from the "claim of right" doctrine. It is submitted that to impute to the mistaken excess payment a character different from that which it actually has, solely for supposed practical reasons, is not required by the "claim of right" doctrine, and does not, in fact, serve the practical ends sought to be accomplished. To treat the excess bonus on the basis of what it actually is would not be a departure from the "claim of right" doctrine, which is merely a rule of practicality.

It could easily be agreed that niceties of law and logic must at times be put aside to meet the realities of the Government's fiscal needs, and that a taxpayer must not be permitted to delay payment of his taxes pending a dispute, real or feigned, over his right to retain his receipts, or pending the determination of a contingency, the occurrence of which may require repayment of his receipts. But is any of that—the practical justification for the "claim of right" doctrine—applicable to money received under and pursuant to a mistake? Can the an-

swer be anything but "no"? If, as in this case, at the time of payment a mistake has occurred, there can be no delay in tax payment. The taxpayer does not know there has been a mistake, he knows no reason and can offer no excuse, real or feigned, for not paying his taxes. In fact he will pay his taxes, as did the taxpayer here. The Government has not been made a party to a private lawsuit; payment of taxes has not been made to await the outcome of private litigation; and collection of the tax is not imperiled because there is no delay and it is paid when due. If later the mistake is discovered and it is learned that there actually was no income and the taxpayer gets back his taxes, how is the Government harmed; how are its finances imperiled; how has the principle of annual accounting been violated? In no way, it is submitted. From the point of view of tax accounting and tax administration, the situation is essentially no different from that of any refund of taxes. If the unyielding rule announced is to be given full sweep, if the principle of annual accounting is to be given the ultimate protection, then all refunds must be barred. That, of course, is absurd. The result announced herein is, at the very least, equally unnecessary to preserve the inviolability of the principle of annual accounting.

Certainly this Court will agree that in the event of a mistake, simple justice requires that the taxpayer be restored to his original position—that the *status quo* be recreated insofar as possible. Likewise this Court must agree that the "claim of right" doctrine is a rule of convenience. As such, therefore, it is a matter of form or procedure—taxes must be paid when what appears to be income is received. If the taxes are paid in the first instance, as in this case, is not the rule of convenience satisfied? Should then this rule of convenience, of pro-

cedure, become a matter of substance so as to prevent a refund of the tax when the true facts are known? Did this Court intend such a result and intend to extinguish simple justice?

II.

This Court Has Overlooked One Of The Tests Of Taxability Laid Down By It In Commissioner v. Wilcox, 327 U. S. 404.

Great reliance has been placed upon *Commissioner* v. *Wilcox*, 327 U.S. 404, as sustaining the argument that the court below was correct and that the refund of taxes sought should be granted. This Court distinguished that case upon the ground that (Opinion, p. 2) "an embezzler asserts no 'bona fide legal or equitable claim' ". While it is true that the impossibility of an embezzler asserting a "claim of right" was a factor in the decision in that case, actually the greatest part of the opinion was devoted to the embezzler's lack of title; to the existence of his unconditional obligation to repay, which arose when he took the money. It is submitted that therein lies the true basis of the decision in the *Wilcox* case. At the very least, it was of equal significance with the absence of a "claim of right". The presence of that same unconditional obligation to repay, arising immediately upon the receipt of the excess bonus as the result of and pursuant to a mistake, has been argued at length herein already. Yet this Court makes no mention of that element of this case. It cannot be seen how the decision herein is not inconsistent with and contrary to the decision in the *Wilcox* case. All logic and reason insist that both decisions cannot stand. Either the *Wilcox* case must be disavowed or the judgment below must be affirmed.

III.

This Decision Is Manifestly Unjust, Places The Government In An Unconscionable Position, And Will Inevitably Lead To Further Inequitable And Undesired Results.

Adverting again to *Commission* v. *Wilcox*, 327 U.S. 404, a paradox is readily apparent. An embezzler who dissipates the fruits of his crime pays no tax, while one who makes an honest mistake and pays back the erroneously received money must pay a tax.

How can the Government in good conscience retain the tax imposed upon the recipient of the excess bonus and at the same time accept the tax paid by the taxpayer's employer on the same money when such employer amends its return, reduces its deduction to only the correct amount that should have been paid, and pays an additional tax?

How can the Government in good conscience retain a tax upon that which, when the true facts appear, is not income?

Putting aside the equities in this case, what are the consequences and the effect of this decision? Suppose a taxpayer is to be compensated upon a percentage of the sales which he makes. Suppose, further, that in computing his compensation a purely arithmetical error is made; the sales are added incorrectly, or the percentage calculation is erroneous, or both. Suppose, still further, that the result of the arithmetical error is that the taxpayer is paid more than he is entitled to receive. Under the decision in this case that taxpayer, having paid income taxes upon the full amount received, would not be entitled

to a tax refund when the error is discovered and the excess repaid. Let us consider another situation. Suppose an employee is required at the end of each week to report to his employer the total number of hours he has worked during that week, segregating his straight time and his overtime hours. Suppose this employee, being unlearned in the science of simple arithmetic, consistently and continuously makes mistakes in adding up his hours. Suppose the employer accepts the report of the employee and pays him upon the basis thereof. Suppose after the end of the year a check is made of the hours actually worked by the employee and it is discovered that, because of mistakes in addition, the employee has reported incorrectly the hours worked by him and has been paid more than he was entitled to receive. Under the decision in this case, that employee-taxpayer, having paid income taxes upon the full amount received, would not be entitled to a tax refund when the error is discovered and the excess repaid. Therefore, under this decision, if, because someone has not learned to add and subtract properly, a taxpayer receives more in pay than he is entitled to receive, he must pay a tax upon the excess, even if the error is discovered and the excess repaid one minute after the end of the annual accounting period. Annual accounting remains inviolate, but is not the result intolerable? If the decision of this Court stands, that unjust and certainly unintended result must come about as night must follow day. It is inconceivable that this Court intended to create such a rule.

CONCLUSION.

For the foregoing reasons, it is respectfully prayed that a rehearing herein be granted and that upon such rehearing this Court withdraw its present decision and, instead, affirm the judgment below.

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Respondent.

ARTHUR C. CHAPMAN,
Of Counsel.

April, 1951.

CERTIFICATE OF COUNSEL.

It is hereby certified that the foregoing petition for rehearing in this case is presented in good faith and not for delay.

SIGMUND W. DAVID,
Attorney for Respondent.